BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARTHUR ALLEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,767
WHEELED COACH INDUSTRIES, INC.	)	
Respondent	)	
Self Insured	)	

ORDER

Claimant appeals from the September 22, 2000 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant was injured February 2, 1998 while working for respondent. This is not disputed, at least for purposes of this review. What is disputed is whether claimant suffered a new injury or an aggravation of his previous injury after he was released to return to work with restrictions by the authorized treating physician. Claimant did not return to work for respondent. Judge Moore initially awarded claimant preliminary benefits by his Order of June 15, 1998. But claimant's subsequent requests for additional medical treatment, a change of treating physician and/or a court ordered IME were denied. Claimant contends that his current condition and need for medical treatment is a natural progression of the original injury. Respondent counters that claimant's current condition and need for medical treatment is not the result of the February 2, 1998 accident, but instead is the result of a subsequent accident and intervening injury. Therefore, the issue is whether claimant's current need for medical treatment is due to an accidental injury that arose out of and in the course of claimant's employment with respondent. This issue is considered jurisdictional and is subject to review by the Board on an appeal from a preliminary hearing order.[1]

FINDINGS OF FACT

1. On February 2, 1998, claimant injured his low and mid-back in the course of performing his regular job duties for respondent, lifting and moving a sheet of steel.

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[1] K.S.A. 1999 Supp. 44-534a(a)(2) and K.S.A. 1999 Supp. 44-551(b)(1).

2. After some delay, claimant was provided authorized medical treatment with an orthopedic surgeon, David G. Anderson, M.D. In addition to plain x-rays, an MRI and bone scan were obtained. The MRI showed some mild bulging at T12-L1 and slight bulging of the lower thoracic and multiple lumbar discs, but no spinal stenosis and no herniations. Claimant was treated with anti-inflammatory and pain medications and physical therapy. Because of ongoing complaints, ultrasound treatments and a TENS unit were also provided.

3. On February 19, 1999, after claimant had completed work hardening, Dr. Anderson released claimant to return to work with the restriction of no lifting over 50 pounds. His final diagnosis was sprain of the thoracolumbar spine superimposed upon early rheumatoid arthritis.

4. After his release by Dr. Anderson, claimant continued to have back problems, including numbness and pain down his left leg and an inability to sleep. Claimant denies that his worsened condition was caused by any subsequent accident or activity. In August of 1999, claimant called Dr. Anderson's office about obtaining additional treatment. According to claimant he was refused. Dr. Anderson testified that an appointment was made but claimant was a no show.

5. Although Dr. Anderson did not see claimant again after March 15, 1999, Dr. Anderson testified that he did not believe claimant's worsened condition for which claimant was seen by Dr. Murati in September 1999 would be due to the work related injury.

> Q. Doctor, assume that approximately six months after you discharged this patient he was seen by a physiatrist who found that he had numerous disc problems, lumbar and sacral, and recommended that he would have to have surgery at two levels. If, in fact, that were true, would that have resulted from activities which the claimant participated in after March 15th, 1999?
> A. I don't feel so. Oh, yeah, after that?
> Q. Yes.
> A. You mean after I last saw him?
> Q. After you last saw him.
> A. I would have to assume that something – some other incident occurred to create that situation.
> Q. Because that did not exist when you last saw him?
> A. The work that we have done as far as examination and tests did not show us anything that would require surgery.[2]

[2] Deposition of David G. Anderson, M.D., June 19, 2000, at 6-7.

6. Claimant was seen by Dr. Pedro A. Murati on September 29, 1999 at the request of his attorney. Dr. Murati reviewed the MRI and bone scan that were ordered by Dr. Anderson. The respondent's brief suggests that claimant had a second MRI taken on September 29, 1999 and that this second MRI was the first test to indicate a herniated disc, but it is clear from Dr. Murati's report that the MRI and bone scan he reviewed were the same ones that Dr. Anderson had ordered which were taken on September 2, 1998, and December 2, 1998, respectively. On examination, Dr. Murati found claimant to have decreased sensation in the bilateral L4 dermatome, ankle jerks were absent bilaterally, lumbar paraspinals were tender and very tight, and range of motion was limited. He diagnosed low back pain secondary to polyradiculopathy and advised claimant that he will probably need a fusion. Dr. Murati is a physiatrist, not an orthopedic surgeon. When Dr. Murati next saw claimant on June 12, 2000, he noted that claimant's condition had gotten worse, and Dr. Murati told claimant that he definitely needed a surgical evaluation. Dr. Murati related claimant's condition to the February 2, 1998 injury.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[5]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[6] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[7] The ALJ found that claimant's subsequent work

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[3] K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 1999 Supp. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 1999 Supp. 44-501(g).

[6] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

[7] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

activities constituted an intervening accident that caused claimant's worsened condition. Accordingly, he found the current complaints were not compensable as a direct and natural consequence of the original February 1998 work related injury. The Appeals Board disagrees. The record shows that claimant has never been symptom free. Even at the time he was released by Dr. Anderson, claimant was complaining of back pain and an inability to sleep. He returned to work as a contractor and worked within restrictions given by Dr. Anderson. Claimant testified that he primarily performed lighter duty and supervisory work. This is disputed, but the Appeals Board finds credible claimant's testimony that he did not violate the 50 pound lifting restriction. At the time of the July 14, 2000 Preliminary Hearing, claimant was no longer involved in construction and was working as a machinist at Lee Aerospace in Wichita. He said his job there did not require any lifting.

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports the claimant's contentions. Therefore, the ALJ's decision not to award preliminary benefits should be reversed and the claim is remanded for a decision on claimant's requests for medical treatment, a change of authorized treating physician and/or an independent medical examination. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[8]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bruce E. Moore on September 22, 2000, should be, and the same is hereby, reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Andrew L. Oswald, Hutchinson, KS
John F. Hayes, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

[8] K.S.A. 1999 Supp. 44-534a(a)(2).